Supreme Court, U.S.
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Docket No._____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES WATKINS, PETITIONER

V.

STATE OF GEORGIA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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43 pp

QUESTION PRESENTED:

WHETHER THE APPELLATE COURT ERRED BY HOLDING THAT THE PETITIONER RECEIVED A FAIR TRIAL FROM A NEUTRAL MAGISTRATE WHERE THE TRIAL JUDGE DEMONSTRATED AN OBVIOUS BIAS IN FAVOR OF THE STATE BY INSTRUCTING THE PROSECUTOR TO RECALL AND ELICIT TESTIMONY FROM A WITNESS

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The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court of Appeals.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported as State v. James Watkins, A01A1968. A copy of this opinion is attached as Appendix "A," to this petition.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on January 22, 2002. This court has jurisdiction pursuant to United States Supreme Court Rule 12&13, over this matter as it is an appeal from the denial of the Georgia Supreme Court to exercise discretionary review of a holding of the Georgia Court of Appeals. The Georgia Supreme Court entered its order on May 28, 2002.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

The petitioner, JAMES WATKINS was accused along with a co-defendant, Alfred Gossett, by J. Tom Morgan, District Attorney of Dekalb County of possession with intent to distribute cocaine on January 4, 2001. (R, 3) Gossett pled guilty to Possession With Intent To Distribute on March 2, 2001. (R, 3)

The State presented the following witnesses on the first day of trial and last day of testimony or May 1, 2001: Officer Terry M. White, Officer Harry Stiles and crime lab technician, Tina Wu, respectively. Officer White testified that on January 4, 2001 he was positioned across the street from a Chevron gas

station at a U- Haul gas station watching people leave the location and trying to determine whether they were involved in drug activity. (T, 18, 11-19).

According to Officer White's testimony, two individuals, who were standing at the Chevron gas station, walked towards him until he, Officer White informed them that he was waiting on someone, at which point they walked away. (T, 19, 2-20). Officer White never claimed that any of the individuals that he observed that night committed a criminal offense.

Officer White never identified Petitioner, James Watkins as one of the two people that he saw walking towards his car. Officer White never identified James Watkins as a person he saw possess, sell, or attempt to sale cocaine.

It was due to this lack of probable cause that Officer White, a police officer with full arrest powers, requested a uniform patrol unit to merely perform a "stop and talk."(T, 19,

2-19) or "ask them what they are doing at the location." (T, 19-20, 25-2) Officer Stiles in responding to Officer White's call approached Petitioner and Gossett because they, according to Stiles, fit Officer White's description, (T, 22, 22), however, they were not standing in front of the Chevron Station- as White reported, they–Petitioner and Gossett were, instead, walking eastbound on Church Street. (T, 23, 13-15)

According to Officer Stiles' testimony, he drove up behind Petitioner, James Watkins and Alfred Gossett, at 7:45 p.m., and claims to have been able to see something white "fly to the right." (T, 23, 13-15), but could not remember who was standing on the right. (T, 24, 2) Officer Stiles claims to have found the bag that was thrown with 34 hits of crack cocaine inside. (T, 24, 7-9).

After the cross-examination and release of both Officer White and Stiles, the only evidentiary witnesses presented at trial, the prosecutor approached the bench to report that Alfred

Gossett had not shown up for court nor could he be found. (T, 26, 25)

The State also informed the trial court that Alfred Gossett was not subpoenaed. (T, 27, 22). It is important to note that up to this point in the trial– after the release of Officer Stiles, the State had not made mention of the alleged $272 found on Petitioner, the word possession had not been used or explained by any witness; the term possession with intent to distribute had not been used or explained by any witness; Officer Stiles had not opined that the weight or packaging of the crack cocaine found by him meant that it was for distribution as opposed to personal use; no witness including Stiles had opined that the money found on Petitioner was conducive to drug activity and Stiles had not opined that a certain number of hits of crack cocaine meant that it was for distribution.

The State did not elicit this testimony from these first two witnesses-White and Stiles because they could not provide

it.

It is for this reason, the importance of Gossett's testimony, and the apparent absence of some witness to testify to Petitioner's alleged possession of the 34 hits of cocaine, that the State approached the bench.

Whereupon, the trial court informed the State through a series of remarks that it could elicit the surrounding "circumstances" from the officer who made the arrest to wit: Who was it that arrested Mr. Watkins? (T, 29, 7), "... Officer Stiles" (T, 29, 8); "you didn't go into anything about the money, nothing about the circumstances, nothing like that whatsoever." (T, 29,9-11); I suggest you better get him or try to find him. (T, 29, 24-25)

Less than two hours before making these remarks or immediately preceding the lunch break and direct examination of Officer White, the trial court had explained the legal significance of showing "the circumstances", i.e., **"THE WAY**

YOU SHOW INTENT TO DISTRIBUTE IS YOU SHOW ALL THE SURROUNDING CIRCUMSTANCES, ... THAT'S MY UNDERSTANDING OF THE LAW IS THAT YOU SHOW THE SURROUNDING CIRCUMSTANCES, INCLUDING THE NUMBER OF DRUGS, THE WAY THEY ARE PACKAGED."(T, 14, 1-3)

The trial court explained his assistance first by stating "If somebody overlooks something I don't think it is fair, I don't think the cause of justice is served by either side if somebody overlooks something, they make a mistake, I'm not going to – actually I do it more for defense attorneys than I do it for prosecutors." (T, 30, 11-16).

The trial court's second and last justification was: "we all make mistakes including me." (T, 32, 7).

The trial court was eventually thanked by the State for its assistance. (T, 32, 7-8) And for good reason as the State had utterly forgotten to establish the elements of possession much

less possession with intent to distribute, e.g., "the money was an oversight. I don't know why I didn't go into that. That was a complete oversight on my part." (T, 29, 20-22)

Preservation of error.

The Petitioner raised as his first enumeration of error on appeal a violation of the federal due process clause as applied to the State of Georgia via the Fourteenth Amendment. The Georgia Court of Appeals passed on this issue in the first paragraph of its opinion holding that the trial judge has discretion under Georgia law to "interfere with the conduct of counsel in an effort to require counsel to present properly to the jury admissible evidence on the relevant legal issues."

REASON FOR GRANTING THE WRIT:

The Due Process Clause of the fifth amendment guarantees that " no person shall be... deprived of life, liberty or property, without due process of law..." (U.S. Const. amend. V). This constitutional guarantee is applied to the states via the

fourteenth amendment, which states in pertinent part "No ... State [shall] deprive any person of life, liberty, or property, without due process of law ..."(U.S. Const. amend. X1V, § 1).

Due process requires an impartial judge. "It certainly violates the fourteenth amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in the case. ; Ward v. Monroeville, 409 U.S. 57, 58, 34 L. Ed. 2d 267, 93 S. Ct. 80. *See also* Withrow v. Larkin, 421 U.S. 35, 46, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975)(The floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal" before a judge with no actual bias against the defendant or interest in the outcome of his particular case). Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822, 89 L. Ed. 2d 823, 106 S. Ct. 1580-825(1986); Johnson v. Mississippi, 403 U.S. 212, 215, 29 L. Ed. 2d 423, 91 S. CT. 1778-216(1971);Mayberry v. Pennsylvania, 400 U.S.

455 (1971); Bracy v. Gramley, 520 U.S. 899, 905, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997); In re Murchison, 349 U.S. 133, 137, 99 L. Ed. 942, 75 S.Ct. 623-139 (1955)

There are essentially two categories of partiality which if demonstrated by a judge or his office would violate the due process clause: the first involves the Judge's bias or prejudice not manifested by his actions, but rather by his office, typically this comes by way of financial compensation which is so intertwined with the appearance of partiality that one can not separate the ability to be neutral from the amount of compensation paid if he is not, in this situation, the Court in finding due process violations has focused on the unsavory appearance created by the manner in which the judge is paid. *See* Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S. Ct. 437 (1927)(The mayor of an Ohio town was compensated as the town judge in such a manner as to conflict with his obligation to give defendants a fair trial). A judge under these circumstances

could actually be unaffected by salary and yet be said to have an interest in the outcome and thereby violate a defendant's right to due process because his salary is based upon the number of times he found against the accused. Connally v. Georgia, 429 U.S. 245; 97 S.Ct. 546; 50 L. Ed. 2d 444 (1977).

The second, involves actual bias demonstrated by the Judge's improper comments and actions during the course of the proceeding. This conduct is more egregious then the former, as in the latter, the Judge has actually undertaken steps either by word or by deed that ultimately taints the outcome of the proceeding. It does not matter that he, the trial judge, makes his views known outside the presence of a trial jury but in a courtroom open to the public or that he makes them in private knowing that they will end up in the public. What is important is that his actions have eroded the notion of a fair trial overseen by a fair and impartial arbiter.

For this reason, the United States Court of Appeals for the District of Columbia reversed a trial judge for making extra-

judicial comments during secret interviews with the media criticizing one of the parties--the Appellant Bill Gates , in terms which questioned his credibility, to wit:

> the District Judge likened Microsoft's writing of incriminating documents to drug traffickers who "never figure out that they shouldn't be saying certain things on the phone:" "The Judge apparently became ... "increasingly troubled by what he learned about Bill Gates and Paul Allen and their shaggy-haired first employees at Microsoft." The reporter wrote that the Judge said he saw in the picture " a smart-mouthed young kid who has extraordinary ability and needs a little discipline. I've often said to colleges that Gates would be better off if he had finished Harvard." United States v. Microsoft Corp., *346 U.S. App. D.C. 330*; 253 F. 3d 34

Similarly, the comments made during the course of the

trial in the case sub judice outside the presence of the jury were improper due to the public appearance of partiality, just as those made to the reporter in *Microsoft,* both judges made biased comments which tainted the process, giving the appearance that they were partial to the government's position over the Defendant.

Clearly here, as in *Microsoft,* the focus is centered around one issue– whether the judge's comments gave the appearance of partiality, this threshold was meet in the previous cases without the defendant having to prove that he actually suffered prejudice as a result of the judge's bias. In short, it did not matter in *Microsoft, Connally, Tumey and Monroeville,* that the judge's comments, actions or compensation did not actually effect their decision.

Here, however, unlike *Microsoft, Connally, Tumey and Monroeville*, the trial judge's comments did have an effect on the outcome, beginning with the trial court's reaction to the surprising revelation that the State could not produce her most

important witness, Alfred Gosset, had no right to a continuance and was about to rest after the testimony of the crime lab expert, Tina Wu; and thereafter face dismissal upon the upcoming defense motion for directed verdict to wit:

> THE COURT: I DO NOT UNDERSTAND. I DO NOT UNDERSTAND **WHY YOU DID NOT SUBPOENA HIM. THAT'S INCREDIBLE, THAT YOU** DID NOT SUBPOENA HIM, MS. DANIELS. (T, 28, 2-3)
>
> MS. DANIELS: WELL, YOUR HONOR, I HAD NO REASON TO THINK THAT I NEEDED TO. (T, 28, 5-6)
>
> **THE COURT: DO YOU UNDERSTAND NOW, OF COURSE YOU DON'T HAVE HIM UNDER SUBPOENA SO YOU HAVE NO WAY OF ENFORCING A SUBPOENA?** (T, 28, 12-14)
>
> MS. DANIELS: I UNDERSTAND THAT.(T, 28, 18)
>
> **THE COURT: YOU UNDERSTAND THAT I CAN'T SEND A SHERIFF OUT TO GET HIM?**(T, 28, 16-17)
>
> MS. DANIELS: I UNDERSTAND.(T, 28,18)
>
> **THE COURT: YOU HAVE NO LEGAL GROUNDS FOR A MOTION FOR A CONTINUANCE. THAT'S THE REASON WHY YOU SUBPOENA SOMEONE.(T, 28, 19-21)**
>
> MS. DANIELS: I UNDERSTAND. AND IF I AGAIN, OBVIOUSLY 20-20 HINDSIGHT AND MONDAY MORNING QUARTERBACKING, I SHOULD HAVE SENT A SUBPOENA OUT TO HIM. BUT HE WAS LITERALLY CHOMPING AT THE BIT TO BE ABLE TO COME AND MAKE RIGHT WHAT HAD HAPPENED.

SO IT JUST NEVER CROSSED MY MIND THAT I WOULD BE FACING THE SITUATION THAT I AM FACING RIGHT NOW. I GUESS AT THIS POINT THE ONLY THING I WOULD ASK IS ONCE MS. WU GETS HERE, I GUESS WE CAN PUT UP THAT EVIDENCE. AND IF HE DOESN'T SHOW, HE DOESN'T SHOW. THAT'S THE CASE. (T, 28-29,22-6)

Realizing that the linchpin of the prosecution's case, Alfred Gossett, was unavailable and worst still that a continuance was not legally justifiable because Gossett was never subpoenaed, the trial court sought to help the State survive the upcoming motion for directed verdict by instructing the prosecutor on what she did not establish during the direct examination of the arresting officer, Officer Stiles, to wit:

THE COURT: WHO WAS IT WHO ARRESTED MR. WATKINS?(T, 28, 7)

MS. DANIELS: MR. STILES, OFFICER STILES.(T, 28, 8)

THE COURT: YOU DIDN'T GO INTO ANYTHING ABOUT THE MONEY, NOTHING ABOUT THE CIRCUMSTANCES, NOTHING LIKE THAT WHATSOEVER.(T, 28, 9-11)

MS. DANIELS: I FORGOT ABOUT THE MONEY. THE MONEY WAS AN OVERSIGHT, AND I DON'T KNOW WHY I DIDN'T GO INTO THAT. THAT WAS A COMPLETE OVERSIGHT ON MY

PART.(T, 28, 2023)

THE COURT: WELL, I SUGGEST YOU BETTER GET HIM OR TRY TO FIND HIM.(T, 28, 24-25)

The trial court even acknowledged that he had helped the State as follows:**"If somebody overlooks something I don't think it is fair, I don't think the cause of justice is served by either side if somebody overlooks something, they make a mistake, I'm not going to – actually I do it more for defense attorneys than I do it for prosecutors."** (T, 30, 11-16).

It certainly can't be said that impartiality rests with a judge who decides that he must inform the prosecution on how to satisfy the elements of the charged offense, here, possession with intent to distribute by specifically stating **"YOU DIDN'T GO INTO ANYTHING ABOUT THE MONEY, NOTHING ABOUT THE CIRCUMSTANCES, NOTHING LIKE THAT WHATSOEVER."** (T, 29,9-11); and by telling the prosecutor what witness to use to satisfy it to wit: who was it

that arrested Mr. Watkins? (T, 29, 7), "... Officer Stiles" (T, 29, 8) I suggest you better get him or try to find him. (T, 29, 24-25)

If the court had not given this advise; it is doubtful that this case would have survived the motion to dismiss, especially, given the fact that the judge had expressed his own opinion that the prosecutor had not elicited the requisite evidence to satisfy her burden of proof.

It is impossible to know or understand the trial court's motivation to act in the manner describe herein, however, one comment seemed to epitomized his attitude towards ensuring that the Petitioner received a fair trial with adequate constitutional safeguards where he could have been sentenced to upwards of 30 years, i.e., "... **I REALIZE [THIS] IS A SMALL CASE.**" (T, 29, 14-15).

CONCLUSION

For all of the reasons stated above Petitioner

moves this Court to reverse the decision of the Georgia Court of Appeals.

Respectfully submitted

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APPENDIX "A"

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IN THE COURT OF APPEALS FOR GEORGIA

A01A1968 , WATKINS V. STATE

MILLER, JUDGE

Following a jury trial, James Watkins was convicted of possession of cocain with intent to distribute. On appeal he asserts several enumerations of error, including insufficiency of the evidence to sustain his conviction, the trial court allowing the State to recall a witness and the judge's failure to recuse himself due to alleged bias.

We discern no error and affirm.

Viewed in light most favorable to the verdict, the evidence reveals that an undercover police officer was monitoring suspected drug activity at a gas station in an

area known for its high amount of drug activity. The officer observed two men approach two others standing at the corner of the station. The men who approached spoke with the other two men for a few moments, and then quickly walked away. The two men who had been standing at the corner then looked around the gas station and crossed the street, moving towards the undercover officer's car. As they approached the car, they pulled sweater hoods over their heads. The undercover officer rolled down his window and told the men that he was waiting for someone, and the two men walked away.

Suspecting possible drug activity, the undercover officer contacted a uniformed officer, gave a description of the two men who approached his car, and told the officer to do a "stop and talk" on the two men. The uniformed officer arrived within a few seconds and drove up behind two who matched the description given by the undercover

officer. As he drove closer, the officer saw something white fly to the right of the two men. He stopped the two men and discovered that the thrown object was a plastic bag containing thirty-four hits of crack cocaine. Although it had been raining that day and the ground was wet, the plastic bag containing the crack was dry as if it had just been thrown on the ground. The officer arrested the two men, James Watkins and Alfred Gossett, and at the time of the arrest found that Watkins was carrying $272 in case, mostly in small bills.

Gossett pled guilty, and Watkins went to trial. The State indicated that Gossett was prepared to testify regarding Watkin's plan to sell the cocaine. However, when the State failed to subpoena him, Gossett did not appear at trial. Outside the presence of the jury, the judge chastised the State for failing to subpoena their key witness and also criticized the State for failing to discuss the money

that was found on Watkins or the circumstances surrounding his arrest during the original testimony of the arresting officer. The State acknowledged its mistake in failing to subpoena Gossett and further acknowledged its oversight in failing to ask the arresting officer about the money that Watkins was carrying at the time of his arrest. The judge then counseled the State to find the arresting officer. The judge state that in the interest of fairness and justice, he would allow the State to recall the arresting officer to correct its oversight, and that if defense overlooked something he would do the same for him. The judge further state that he has more often accorded such leeway to defense attorneys than the State. Defense counsel objected, claiming that the court "tipped off" the State regarding its need to recall the arresting officer.

After the jury returned, the State indicated that Gossett was not there to testify, and the judge said that the

prosecutor apparently did not know where Gossett was. Defense counsel did not object to the judge's statement.

The arresting officer testified as to his experience in dealing with drug crimes, and that the denominations of money found on Watkins were consistent with drug sales. He also testified as to the amounts of crack cocaine that, in his experience, would indicate quantities for personal use or for distribution, and that the amount at issue here would more likely be for distribution. Defense counsel objected, stating that no foundation had been laid for the officer to express such an opinion, but did not object on the basis that the officer was testifying to an ultimate issue to be decided by the jury.

After the State rested, defense counsel moved for a directed verdict. He did not object to the trial judge ruling on his motion or question the judge's objectivity, but in fact requested that the judge rule on it. The judge denied

the motion.

The judge gave pattern jury instructions on direct and circumstantial evidence including and instruction that exhibits constituted direct evidence. To clarify the distinction between direct and circumstantial evidence, the judge described direct evidence of a person being at the beach as someone testifying that they saw the person at the beach, versus someone testifying that they saw the person's footprints in the sand. The judge also charged the jury on parties to a crime. Defense counsel claimed that he was not informed that the judge would give a charge on parties to a crime, but the judge stated on the record that he had informed defense counsel at the charge conference that the charge would be given. The charge conference was not recorded.

During deliberations, the jury submitted written questions to the judge, and he recharged the jury several

times on actual, constructive, sole, and joint possession, on the State's burden of proof, and on parties to a crime. The judge also allowed the jury to consider Gossett's guilty during deliberations, as it went out with the jury without any objection from defense counsel. The jury returned a guilty verdict against Watkins for possession of cocaine with intent to distribute.

1. Watkins contends that the trial judge erred by assisting the State when he informed the State that it needed to recall the arresting officer. However, the trial judge may interfere with the conduct of counsel in an effort to require counsel to present properly to the jury admissible evidence on the relevant legal issues[1] That is precisely what the judge was doing here. His helpful comments to

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[1] See *Dyke v. State*, 232 Ga. 817, 825 (III)(209 SE2d 166)(1974)

the State, outside the presence of the jury, did not indicate any lack of fairness.[2]

Moreover, a judge has broad discretion to allow the recall of a witness, even one that has been excused.[3] The arresting officer here had not yet been excused and had just testified. We find no abuse of discretion in the court allowing the recall of this witness.[4]

2. Watkins claims that the trial judge erred by failing to recuse himself due to alleged bias prior to ruling on Watkin's motion for directed verdict. He argues that the judge was biased because he informed the State that it needed to recall the arresting officer. However, Watkins never moved to recuse the judge, nor did he object to the

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[2] See *Johnson v. State*, 126 Ga. App. 93, 96(3)(189 SE2d 900)(1972)

[3] *Lynn v. State*, 251 Ga. App. 155, 157 (2)(a)(_____SE2d_____)(2001)

[4] See id.

judge ruling on his motion for directed verdict. He has therefore failed to preserve this issue for appellate review.[5]

3. Notwithstanding his argument that the trial judge should have recused himself prior to ruling on his motion for directed verdict, Watkins contends that the trial court erred by denying his motion for directed verdict. We disagree.

The standard of review for the denial of a motion for directed verdict of acquittal is the same as for determining the sufficiency of evidence to support a conviction.[6] We view the evidence in light most favorable to the jury's verdict, and the defendant no longer enjoys the

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[5] See *Johnson v. State*, 250 Ga. App. 245, 246-247(1)(550 SE2d 113)(2001)

[6] *Hash v. State*, 248 Ga. App. 456, 457 (1)(546 SE2d 833)(2001)

presumption of innocence.[7] We do not weigh the evidence or determine witness credibility, but only determine if the evidence was sufficient for a rational trier of fact to find the defendant guilty of the charged offense beyond a reasonable doubt[8]

Based on the evidence that the police observed Gossett and Watkins behaving consistent with drug sale activity, that the cocaine was thrown after the police approached Gossett and Watkins, and that Watkins was the one with the money, the jury could have concluded that Watkins possessed the cocaine along with Gossett and knew about the cocaine.[9]

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[7] *Short v. State*, 234 Ga. App. 633, 634 (1)(507 SE2d 514)(1998)

[8] *Id;* see also *Jackson v. Virginia,* 443 U.S. 307 (99 SC 2781, 61 LE2d 560)(1979).

[9] See *Price v. State*, 240 Ga. App. 37, 39 (1)(522 SE2d 543)(1999); *Smith v. State*, 235 Ga. App. 223, 225-226 (510 SE2d 295)(1998)

White it is true that mere possession of cocaine will not support a conviction for possession with intent to distribute, additional evidence such as possession of certain amounts of money and expert testimony that the amount of cocaine possessed was consistent with amounts for sale rather than personal use may support proof of intent to distribute.[10] Here, the arresting officer testified that based on his experience with drug enforcement, the amount of money found on Watkins was consistent with drug sales, and that the amount of cocaine involved was more likely to be used for distribution rather than personal use. The evidence was sufficient for the jury to exclude reasonable hypotheses of innocence and to find Watkin guilty of possession of cocaine with intent to distribute.

4. Watkins further argues that the trial court erred

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[10] See *Burse v. State*, 232 Ga. App. 729, 730 (1)(503 SE2d 638)(1998)

by allowing the jury consider Gossett's guilty plead during its deliberations. However, Watkins did not object when the guilty plea was sent back with the jury and has therefore failed to preserved this issue for appellate review.[11]

5. Watkins also asserts that the arresting officer inappropriately testified to the ultimate issue to be decided by the jury. More specifically, he argues that he officer should not have been allowed to testify that the amount of crack at issue in this case was more likely to be used for distribution than personal use. However Watkins did not object to the officer's testimony on this basis at the trial court level and has therefore waived this issue on appeal.[12]

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[11] See *Bostick v. Ricketts*, 236 Ga. 304, 305-306 (1)(223 SE2d 686)(1976); *Flowers v. State*, 159 Ga. App. 516, 517 (284 SE2d 32)(1981)

[12] *Huntley v. State*, 271 Ga. 227, 230 (5)(518 SE2d 890)(1999)

6. Watkins urges that the trial court erred by giving an instruction that direct evidence included trial exhibits. He argues that because the cocaine seized in this case was the only exhibit, the instruction may have misled the jury into believing that the cocaine was to be considered as direct evidence of his guilty. We disagree

The charge on direct evidence was not erroneous.[13] In addition, it was given in the context of an instruction on circumstantial evidence. "Viewing the jury instructions as a whole, we do not believe that he jury could have construed the charge to mean that all exhibits were to be considered direct evidence pointing immediately to the question of guilt.[14]

7. Watkins contends that the judge improperly

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[13] *Hampton v. State*, 272 Ga. 284, 287-288 (8)(527 SE2d 872)(2000).

[14] (Citation omitted.) Id.

injected his opinion about Watkin's guilt by recharging the jury on knowledge, parties to a crime, and actual, sole and joint possession, when he also recharged them on constructive possession. More specifically, he urges that because the jury initially requested a recharge only on constructive possession, the repeated recharging on these other issues placed more emphasis on Watkins's guilt. We disagree.

The record reveals that in direct response to several questions from the jury, the judge recharged the jury and also reminded the jurors to keep in min the other charges that had previously been given, including those on the State's burden of proof and the presumption of innocence. Prior to recharging the jury in response to their specific requests, the judge gave proper charges on reasonable doubt, the presumption of innocence, equal opportunity to possess, and mere presence. The judge also instructed the

jurors that nothing he did during the trial was intended to indicate any opinion he had about the case. Looking to the charge as a whole, we conclude that the trial judge did not express an opinion about Watkins's guilt or innocence[15]

8. Wakins further argues that the trial judge did not inform him of what jury charges would be given at trial. However, the record reveals that the trial judge reminded defense counsel that he had informed him of what charges would be given at the charge conference. The charge conference was not recorded, and Watkins has therefore failed to affirmatively show any error from the record.[16]

9. Watkins urges that the trial judge erred by commenting in front of the jury that the State did not know

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[15] See, e.g., *Reid v. State*, 232 Ga. App. 313, 314-315 (1)(501 SE2d 842)(1998).

[16] *Stephenson v. State*, 218 Ga. App. 613, 615 (2)(462 SE2d 767)(1995)

the wereabouts of Gossetts, one of their key witnesses. Watkins failed to object to this comment form the judge and has therefore presented noting for this court to review.[17]

Judgement affirmed. Andrews, P.J., and Eldridge, J., concur

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[17] *Sconyers v. Williams,* 198 Ga. App. 673, 674 (2)(402 SE2d 775)(1991)

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: May 26, 2002

Benjamin Alando Davis, Jr.
1201 Peachtree Street
400 Colony Square, Suite 200
Atlanta, GA 30361

Case No. S02C0805

JAMES WATKINS V. THE STATE

COURT OF APPEALS CASE NO. A01A1968

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

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Sherie M. Welch, Clerk

Docket No._____

IN THE UNITED STATES SUPREME COURT

JAMES WATKINS, *
PETITIONER *
vs. *
*
STATE OF GEORGIA, *
RESPONDENT *

CERTIFICATE OF SERVICE

I, **BENJAMIN A. DAVIS**, Attorney for Petitioner, do hereby certify that I this day served a copy of the within and foregoing ***WRIT OF CERTIORARI*** before the same was offered for filing by depositing the same in the United States Mail with proper postage affixed thereon to insure delivery addressed to :

THURBERT BAKER
State of Georgia Attorney General's Office
40 Capital Square, S.W.
ATLANTA, GEORGIA 30334

This the 31 day of Oct, 2002.

By: Benjamin A. Davis
BENJAMIN A. DAVIS
Counsel of Record

Georgia State Bar No. 207525

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